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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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JUAN CARLOS DE JESUS RODRIGUEZ, LUIS LLIGUIN and MARIO GOMEZ *individually and on behalf of others similarly situated,*

Plaintiffs,

-against-

OBAM MANAGEMENT INC..(d/b/a PITA GRILL), PITA GRILL MURRAY HILL LLC (d/b/a PITA GRILL), PITAGRILLNYC CORP. (d/b/a PITA GRILL), PITA GRILL OF NY INC., (d/b/a/ PITA GRILL), OPHER BEYTONB and BENNETT ORFALY.

Defendants.

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COMPLAINT

COLLECTIVE ACTION UNDER 29 U.S.C. § 216(b)

ECF Case

Plaintiffs Juan Carlos De Jesus Rodriguez, Luis Lliguin and Mario Gomez individually and on behalf of others similarly situated (collectively the "Plaintiffs"), by and through their attorneys, Michael Faillace & Associates, P.C., upon their knowledge and belief, and as against Defendants Obam Management Inc. (d/b/a Pita Grill), Pita Grill Murray Hill, LLC (d/b/a Pita Grill), PitaGrillNYC Corp., (d/b/a/ Pita Grill), Pita Grill of NY Inc., Opher Beytonb and Bennett Orfaly (collectively the "Defendants") allege as follows:

NATURE OF THE ACTION

1. Plaintiffs are former employees of OBAM Management Inc., Pita Grill Murray Hill LLC, PitaGrillNYC Corp. Pita Grill of NY Inc., Opher Beytonb and Bennett Orfaly.

2. Defendants own, operate, or control a chain of fast-food restaurants operating under the trade name Pita Grill in New York City.

3. Plaintiffs worked at Pita Grill restaurants located at 441 Third Avenue, New York, New York 10016 ("Pita Grill Third Avenue"), 1083 Second Avenue, New York New York 10022 ("Pita Grill 57th Street") and 92 Eighth Avenue, New York, New York, 10011 ("Pita Grill Chelsea").

4. Upon information and belief, Individual Defendants Opher Beytonb and Bennett Orfaly serve or served as owner, manager, principal or agent of Defendant Pita Grill, and through the corporate entities operate or operated the restaurants as a joint or unified enterprise.

5. Plaintiffs are former employees of Defendants. They were ostensibly employed as delivery workers. However, the daily work performed by each Plaintiff entailed additional responsibilities that were not related to deliveries.

6. At all times relevant to this complaint, Plaintiffs worked for Defendants in excess of 40 hours per week, without appropriate compensation for the hours over 40 per week that they worked.

7. Rather, Defendants failed to maintain accurate recordkeeping of their hours worked, failed to pay Plaintiffs appropriately for any hours worked over 40, either at the straight rate of pay, or for any additional overtime premium.

8. Further, Defendants failed to pay Plaintiffs the required "spread of hours" pay for any day in which they had to work over 10 hours a day.

9. Defendants employed and accounted for several Plaintiffs as delivery workers in their payroll, but in actuality their duties included greater or equal time spent in non-delivery, non-tipped functions such as vacuuming, sweeping and mopping the main room and the basement; cleaning the kitchen, refrigerators and bathroom; washing the sidewalk; receiving and stocking deliveries of vegetables, cutting vegetables and meats, cleaning the walls of the entire restaurant including the basement, cleaning the grill, dishwashing, cooking pots and other kitchen utensils and stocking vegetables into the main refrigerator (hereafter "non-tipped and non-delivery duties").

10. At all times, regardless of duties, Defendants paid delivery workers at the lowered tip-credited rate.

11. However, under both the FLSA and NYLL Defendants were not entitled to take a tip credit because these Plaintiffs' non-tipped duties exceeded 20% of each workday, or 2 hours per day (whichever was less in each day) (12 N.Y.C.R.R. §146).

12. Upon information and belief, Defendants employed the policy and practice of disguising Plaintiffs' actual duties in payroll records to avoid paying Plaintiffs at the minimum wage rate, and to enable them to pay Plaintiffs at the lower tip-credited rate by designating them delivery workers instead of non-tipped employees.

13. Defendants' conduct extended beyond the Plaintiffs to all other similarly situated employees. At all times relevant to this complaint, Defendants maintained a policy and practice of requiring Plaintiffs and other employees to work in excess of forty (40) hours per week without providing the minimum wage and overtime compensation required by federal and state law and regulations.

14. Plaintiffs now bring this action on behalf of themselves, and other similarly situated individuals, for unpaid minimum wages and overtime wage orders pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA"), and for violations of the N.Y. Lab. Law §§ 190 *et seq.* and 650 *et seq.* (the "NYLL"), and the "spread of hours" and overtime wage orders of the New York Commission of Labor codified at N.Y. COMP. CODES R. & REGS. Tit. 12, § 137-1.7 (2006) (herein the "Spread of Hours Wage Order"), including applicable liquidated damages, interest, attorneys' fees, and costs.

15. Plaintiffs seek certification of this action as a collective action on behalf of themselves, individually, and all other similarly situated employees and former employees of the Defendants pursuant to 29 U.S.C. § 216(b).

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), and supplemental jurisdiction over Plaintiffs' state law claims is conferred by 28 U.S.C. § 1367(a).

17. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c) because all or a substantial part of the events or omissions giving rise to the claims occurred in this district. The Defendants maintain their corporate headquarters and offices within this district, and Defendants restaurants operate and are located in this district. Further, Plaintiffs were employed by Defendants in this district.

THE PARTIES

Plaintiffs

18. Plaintiff Juan Carlos De Jesus Rodriguez ("Plaintiff De Jesus Rodriguez" or "Mr. De Jesus Rodriguez") is an adult individual residing in New York County, New York.

19. Mr. De Jesus Rodriguez was employed by the Defendants from approximately February 2008 until April 2009 at the Chelsea location, from December 2010 until May 2011 at the 57th Street location, and from February 2012 until July 2012 at the Third Avenue location.

20. Plaintiff Luis Lliguin ("Plaintiff Lliguin" or "Mr. Lliguin") is an adult individual residing in New York County, New York. Mr. Lliguin was employed by the Defendants from approximately December 2008 until September 2012.

21. Plaintiff Mario Gomez ("Plaintiff Gomez" or "Mr. Gomez") is an adult individual residing in Queens County, New York. Mr. Gomez was employed by the Defendants from March 2012 to August 2012.

Defendants

22. Defendants own, operate, or control a chain of Restaurants located at 441 Third Avenue, New York, New York 10016 ("Pita Grill Third Avenue"), 1083 Second Avenue, New York New York 10022 ("Pita Grill 57th Street") and 92 Eighth Avenue, New York, New York, 10011 ("Pita Grill Chelsea"), under the name of Pita Grill, at all times relevant to this complaint

23. Upon information and belief, Defendant Obam Management is a domestic corporation organized and existing under the laws of the State of New York. Upon information and belief, it maintains its principal place of business at 441 Third Avenue, New York, New York 10021.

24. Upon information and belief, Defendant Pita Grill Murray Hill LLC., is a

domestic corporation organized and existing under the laws of the State of New York. Upon information and belief, it maintains its principal place of business at 441 Third Avenue, New York, New York 10021.

25. Upon information and belief, Defendant PitaGrillNYC Corp., is a domestic corporation organized and existing under the laws of the State of New York. Upon information and belief, it maintains its principal place of business at 1083 2nd Avenue, New York, NY 10022.

26. Upon information and belief, Defendant Pita Grill of NY Inc., is a domestic corporation organized and existing under the laws of the State of New York. Upon information and belief, it maintains its headquarters at 92 Eighth Avenue, New York, New York, 10011.

27. Upon information and belief, Defendant Opher Beytonb is an individual engaging (or who was engaged) in business with this judicial district during the relevant time period. Defendant Opher Beytonb is sued individually in his capacity as an owner, officer and/ or agent of the Defendant Corporation. Defendant Opher Beytonb possesses or possessed operational control over Defendant Corporation, an ownership interest in Defendant Corporation, or controlled significant functions of Defendant Corporation. He determined the wages and compensation of the employees of Defendants, including Plaintiffs, and established the schedules of the employees, maintained employee records, and had the authority to hire and fire employees.

28. Upon information and belief. Defendant Bennett Orfaly is an individual engaging (or who was engaged) in business with this judicial district during the relevant time period. Defendant Bennett Orfaly is sued individually in his capacity as an owner, officer and/or agent of the Defendant Corporation. Defendant Bennett Orfaly possesses or possessed operational control over Defendant Corporation, an ownership interest in Defendant Corporation, or controlled

significant functions of Defendant Corporation. He determined the wages and compensation of the employees of Defendants, including Plaintiffs, and established the schedules of the employees, maintained employee records, and had the authority to hire and fire employees.

FACTUAL ALLEGATIONS

Defendants Constitute Joint Employers

29. Defendants operate a chain of fast food restaurants located in New York, New York.

30. Each of the Individual Defendants, Opher Beytonb and Bennett Orfaly, possess operational control over Defendant Corporations, possess an ownership interest in Defendant Corporations, and control significant functions of Defendant Corporations.

31. Upon information and belief, Defendants Opher Beytonb and Bennett Orfaly serve or served as Chairman and/or Chief Executive Officer of Defendant Corporations.

32. Defendants are associated and joint employers, act in the interest of each other with respect to employees, pay employees by the same method, and share control over the employees.

33. Each Defendant possessed substantial control over the Plaintiffs' (and other similarly situated employees') working conditions, and over the policies and practices with respect to the employment and compensation of the Plaintiffs, and all similarly situated individuals, referred to herein.

34. Defendants jointly employed the Plaintiffs, and all similarly situated individuals, and are Plaintiffs' (and all similarly situated individuals') employers within the meaning of 29 U.S.C. 201 *et seq.* and the NYLL.

35. In the alternative, the Defendants constitute a single employer of the Plaintiffs

and/or similarly situated individuals.

36. Upon information and belief, Individual Defendants Opher Beytonb and Bennett Orfaly each operate OBAM Management Inc., Pita Grill Murray Hill, LLC, PitaGrillNYC Corp., and Pita Grill of NY Inc. as either alter egos of themselves, and/or fail to operate these corporations as entities legally separate and apart from themselves by among other things

a. failing to adhere to the corporate formalities necessary to operate OBAM Management Inc., Pita Grill Murray Hill, LLC, PitaGrillNYC Corp., and Pita Grill of NY Inc. as a corporation;

b. defectively forming or maintaining the corporate entities OBAM Management Inc., Pita Grill Murray Hill, LLC, PitaGrillNYC Corp., and Pita Grill of NY Inc by among other things failing to hold annual meetings or maintaining appropriate corporate records;

c. transferring assets and debts freely as between all Defendants;

d. operating OBAM Management Inc., Pita Grill Murray Hill, LLC, PitaGrillNYC Corp., and Pita Grill of NY Inc. for their own benefit as the sole or majority shareholder;

e. operating OBAM Management Inc., Pita Grill Murray Hill, LLC, PitaGrillNYC Corp., and Pita Grill of NY Inc. for their own benefit and maintaining control over them as closed corporations;

f. intermingling assets and debts of their own with OBAM Management Inc., Pita Grill Murray Hill, LLC, PitaGrillNYC Corp., and Pita Grill of NY Inc.;

g. diminishing and/or transferring assets to avoid full liability as necessary to protect their own interests; and

h. other actions evincing a failure to adhere to the corporate form.

37. At all relevant times, Defendants were the Plaintiffs' employers within the meaning of the FLSA and New York Labor Law. Defendants had the power to hire and fire Plaintiffs, control the terms and conditions of employment, and determine the rate and method of any compensation in exchange for Plaintiffs' services.

38. In each year from 2007 to the present, the Defendants had gross annual sales of not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated).

39. In addition, upon information and belief, the Defendants and/or their enterprise were directly engaged in interstate commerce. As example, numerous items that were used in the restaurant on a daily basis were goods produced outside of the state of New York.

Individual Plaintiffs

40. The Plaintiffs are all current and former employees of the Defendants, who were (are) primarily employed as delivery workers, however they spent a considerable amount of time performing non-tipped and non-delivery duties

41. They seek to represent a class of similarly situated individuals under 29 U.S.C. § 216(b).

Plaintiff Juan Carlos De Jesus Rodriguez

42. Plaintiff De Jesus Rodriguez was employed by the Defendants from approximately February 2008 until April 2009 at the Chelsea location, from December 2010 until May 2011 at the 57th Street location, and from February 2012 until July 2012 at the Third Avenue location.

43. Plaintiff De Jesus Rodriguez was ostensibly employed as a delivery worker at the Chelsea location and as a cook and delivery worker at the 57th Street and Third Avenue

locations. However, while working as a delivery worker, Plaintiff De Jesus Rodriguez was also required to perform the additional non-delivery, non-tipped functions described above.

44. Although Plaintiff De Jesus Rodriguez was ostensibly employed as a delivery worker, he spent more than two hours on a daily basis performing non-delivery work.

45. Plaintiff De Jesus Rodriguez regularly handled goods in interstate commerce, such as food, sodas, and other supplies produced outside the State of New York.

46. Plaintiff De Jesus Rodriguez's work duties required neither discretion nor independent judgment.

47. Throughout his employment with the Defendants, Plaintiff De Jesus Rodriguez regularly worked in excess of 40 hours per week.

48. From approximately February 2008 until April 2009, Plaintiff De Jesus Rodriguez worked from 10:00 a.m. to 12:00 a.m. seven days a week at the Chelsea location (typically 98 hours per week).

49. From approximately December 2010 to May 2011, Plaintiff De Jesus Rodriguez worked Wednesdays through Mondays at the 57th Street location from 9:00 a.m. to 5:00 p.m. as a cook and from 5:00 p.m. to 12:00 a.m. as a delivery worker (typically 90 hours per week).

50. From approximately February 2012 to July 2012, Plaintiff De Jesus Rodriguez worked Wednesdays through Mondays from 11:00 a.m. to 3:00 p.m. as a delivery worker, and Sundays, Wednesdays, and Fridays from 6:00 p.m. to 12:00 a.m. as a cook at the Third Avenue location (typically 42 hours per week).

51. Throughout his employment with the Defendants, Plaintiff De Jesus Rodriguez was paid his wages in a combination of check and cash.

52. From approximately February 2008 until April 2009, Plaintiff De Jesus Rodriguez

was paid $5.00 per hour.

53. From approximately December 2010 until July 2012, Plaintiff De Jesus Rodriguez was paid $9.00 per hour for his work as a cook and $5 per hour for his work as a delivery worker.

54. Defendants did not grant Plaintiff De Jesus Rodriguez any rest periods or meal breaks.

55. Furthermore, Defendants only provided Plaintiff De Jesus Rodriguez with check stubs for his hours worked as a cook.

56. Defendants did not provide Plaintiff De Jesus Rodriguez with each payment of wages a statement of wages, as required by NYLL 195(3).

57. No notification, either in the form of posted notices, or other means, was ever given to Plaintiff De Jesus Rodriguez regarding overtime and wages under the FLSA and NYLL.

58. Defendants did not give any notice to Plaintiff De Jesus Rodriguez, in English and in Spanish (Plaintiff De Jesus Rodriguez's primary language), of his rate of pay, employer's regular pay day, and such other information as required by NYLL §195(1).

Plaintiff Luis Lliguin

59. Plaintiff Lliguin was employed by the Defendants from approximately May 2009 until September 2012.

60. Defendants ostensibly employed Plaintiff Lliguin as a delivery worker. However, Plaintiff Lliguin was also required to perform the non-delivery, non-tipped functions described above.

61. Although Plaintiff Lliguin was ostensibly employed as a delivery worker, he spent more than five hours on a daily basis performing non-tipped, non-delivery work.

62. Plaintiff Lliguin regularly handled goods in interstate commerce, such as food and other supplies produced outside the State of New York.

63. Mr. Lliguin's work duties required neither discretion nor independent judgment.

64. Plaintiff Lliguin regularly worked in excess of 40 hours per week.

65. From approximately May 2009 until June 2010, Plaintiff Lliguin worked Sunday through Friday from 6 p.m. through 12:30 a.m. (Typically 39 hours per week)

66. From June 2010 to September 2012, Plaintiff Lliguin worked from 9 a.m. until 3 p.m. and again from 6 p.m. until 10 p.m. Thursdays through Tuesdays. (Typically 60 hours per week)

67. Throughout his employment with the Defendants, Plaintiff Lliguin was paid his wages in a combination of check and cash.

68. From May 2009 to September 2012, Plaintiff Lliguin was paid $5 per hour.

69. Plaintiff Lliguin received a check for the first 40 hours and cash for the hours over 40 at the base rate.

70. Defendants granted Plaintiff Lliguin 15 minute breaks or meal periods. However, every Monday when a large delivery arrived, Mr. Lliguin did not take a break and had to work an extra 20 unpaid minutes.

71. Defendants never notified Plaintiff Lliguin that his tips would be included as an offset for wages.

72. Furthermore, Defendants did not provide Plaintiff Lliguin with each payment of wages a statement of wages, as required by NYLL 195(3).

73. No notification, either in the form of posted notices, or other means, was ever given to Plaintiff Lliguin regarding overtime and wages under the FLSA and NYLL.

74. Defendants did not give any notice to Plaintiff Lliguin, in English and in Spanish (Plaintiff Lliguin's primary language), of his rate of pay, employer's regular pay day, and such other information as required by NYLL §195(1).

Plaintiff Mario Gomez

75. Plaintiff Gomez was employed by the Defendants from approximately March 2012 through August 2012.

76. Defendants ostensibly employed Plaintiff Gomez as a delivery worker.

77. However, Plaintiff Gomez was also required to perform the non-delivery, non-tipped functions described above.

78. Although Plaintiff Gomez was ostensibly employed as a delivery worker, he spent more than six hours on a daily basis performing non-delivery work throughout his employment with Defendants.

79. Plaintiff Gomez regularly handled goods in interstate commerce, such as food and other supplies produced outside the State of New York.

80. Plaintiff Gomez's work duties required neither discretion nor independent judgment.

81. Plaintiff Gomez regularly worked in excess of 40 hours per week.

82. From approximately March 2012 until mid-April 2012, Plaintiff Gomez worked from 5:00 p.m. until 12:30 a.m. or 1:00 a.m. five days per week. However, Defendants only paid Mr. Gomez until 12 a.m., even though he was frequently required to work until 1am. (Typically 37.5-40 hours per week).

83. From approximately mid-April 2012 until August 2012, Plaintiff Gomez worked from 12:00 p.m. until 12:30 a.m. four days a week and one day from 10am to 5pm. (Typically 57

hours per week).

84. From approximately March 2012 until August 2012, Plaintiff Gomez was paid $5.00 per hour.

85. Throughout his employment with the Defendants, Plaintiff Gomez was paid his wages by check.

86. Defendants never notified Plaintiff Gomez that his tips would be included as an offset for wages.

87. Defendants did not account for these tips in any daily, weekly, or other accounting of Plaintiff Gomez's wages.

88. Furthermore, Defendants did not provide Plaintiff Gomez with each payment of wages a statement of wages, as required by NYLL 195(3).

89. No notification, either in the form of posted notices, or other means, was ever given to Plaintiff Gomez regarding overtime and wages under the FLSA and NYLL.

90. Defendants did not give any notice to Plaintiff Gomez, in English and in Spanish (Plaintiff Gomez's primary language), of his rate of pay, employer's regular pay day, and such other information as required by NYLL §195(1).

91. Defendants required Plaintiff Gomez to purchase "tools of the trade" with his own funds—including a bicycle for $250, and a lock and helmet for $35 each. Thus, the total cost of the "tools of the trade" Plaintiff Gomez was required to purchase as a delivery worker was approximately $320.

Defendants' General Employment Practices

92. Defendants regularly required Plaintiffs to work in excess of forty (40) hours per

week without paying them the proper minimum and overtime wages or spread of hours compensation.

93. At all times relevant to this complaint, Defendants maintained a policy and practice of requiring the Plaintiffs and all similarly situated employees to work in excess of forty (40) hours per week without paying them appropriate minimum wage and/or overtime compensation, or spread of hours compensation, as required by federal and state laws.

94. Defendants' pay practices resulted in Plaintiffs not receiving payment for all their hours worked, resulting in Plaintiffs' effective rate of pay falling below the required minimum and overtime wage rate.

95. Defendants failed to post required wage and hour posters in the restaurant, and did not provide Plaintiffs with statutorily required wage and hour records or statements of their pay received, in part so as to hide Defendants' violations of the wage and hour laws, and to take advantage of Plaintiffs' relative lack of sophistication in wage and hour laws.

96. Upon information and belief, these practices by Defendants were done willfully to disguise the actual number of hours Plaintiffs (and similarly situated individuals) worked, and to avoid paying Plaintiffs properly for (1) their full hours worked, (2) for overtime due, and (3) for spread of hours pay.

97. Defendants also failed to post at the workplace, or otherwise provide to employees, the required postings or notices to employees regarding the applicable wage and hour requirements of the FLSA and NYLL.

98. Defendants failed to inform Plaintiffs who received tips that Defendants intended to take a deduction against Plaintiffs' earned wages for tip income, as required by the NYLL before any deduction may be taken.

99. Defendants failed to inform Plaintiffs that their tips would be credited towards the payment of the minimum wage.

100. Defendants failed to maintain a record of tips earned by Plaintiffs for the deliveries they made to customers.

101. Moreover, at all times Defendants required Plaintiffs who were tipped employees such as delivery workers to perform the jobs of multiple employees in addition to their primary responsibilities. These additional, non-related, and non-tipped duties occupied more than two hours of each Plaintiff's workday.

102. Defendants paid these Plaintiffs at the lowered tip-credited rate, however Defendants were not entitled to a tip credit because Plaintiffs' non-tipped duties exceeded 20% of each workday (or 2 hours a day, whichever was less) (12 N.Y.C.R.R. § 146). Many Plaintiffs were employed ostensibly as delivery workers (tipped employees) by Defendants, although their actual duties included non-tipped and non-delivery duties

103. New York State regulations provide that an employee cannot be classified as a tipped employee "on any day.. in which he has been assigned to work in an occupation in which tips are not customarily received." (12 N.Y.C.R.R. §§137-3.3 and 137-3.4). Similarly, under federal regulation 29 C.F.R. §531.56 (e), an employer may not take a tip credit for any employee time if that time is devoted to a non-tipped occupation.

104. Plaintiffs' non-delivery duties were not incidental to their occupation as delivery workers, but instead constituted entirely unrelated occupations.

105. Since Plaintiffs spent more than 2 hours of their workday in non-tipped, non-delivery functions, Defendants were not entitled to take a tip credit with respect to their wages.

106. In violation of federal and state law as codified above, Defendants classified Plaintiffs as tipped employees and paid them below minimum wage when they should have classified them as non-tipped employees and paid them at the minimum wage rate for all the hours they worked.

107. Defendants employed several Plaintiffs as delivery workers and required them to provide their own locks, chains and bicycles, and refused to compensate them or reimburse them for these expenses.

108. Defendants did not provide Plaintiffs, and similarly situated employees, with the wage statements and annual pay notices required by NYLL §§195(1) and 195(3).

109. Defendants failed to provide Plaintiffs and other employees with wage statements at the time of payment of wages, containing: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; net wages; the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked, as required by NYLL §195(3).

110. Defendants failed to provide Plaintiffs and other employees, at the time of hiring and on or before February 1 of each subsequent year, a statement in English and the employees' primary language, containing: the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; and the telephone number of the employer, as required by New York Labor Law §195(1).

FLSA COLLECTIVE ACTION CLAIMS

111. Plaintiffs bring their FLSA minimum wage, overtime, and liquidated damages claims as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all similarly situated persons who are or were employed by Defendants or any of them, on or after the date that is three years before the filing of the complaint in this case (the "FLSA Class Period"), as employees of Defendants (the "FLSA Class").

112. At all relevant times, Plaintiffs, and other members of the FLSA Class who are and/or have been similarly situated, have had substantially similar job requirements and pay provisions, and have been subject to Defendants' common practices, policies, programs, procedures, protocols and plans of willfully failing and refusing to pay them at a one and one-half their regular rates for work in excess of forty (40) hours per workweek, and willfully failing to keep records required by the FLSA.

113. The claims of Plaintiffs stated herein are similar to those of the other employees.

FIRST CAUSE OF ACTION
(VIOLATION OF THE MINIMUM WAGE PROVISIONS OF THE FLSA)

114. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

115. At all times relevant to this action, Defendants were Plaintiffs' employers within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(d). Defendants had the power to hire and fire Plaintiffs, control the terms and conditions of employment, and determine the rate and method of any compensation in exchange for their employment.

116. At all times relevant to this action, Defendants were engaged in commerce or in an industry or activity affecting commerce.

117. Defendants constitute an enterprise within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203 (r-s).

118. Defendants failed to pay Plaintiffs at the applicable minimum hourly rate, in violation of 29 U.S.C. § 206(a).

119. Defendants' failure to pay Plaintiffs at the applicable minimum hourly rate was willful within the meaning of 29 U.S.C. § 255(a).

120. Plaintiffs have been damaged in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(VIOLATION OF THE OVERTIME PROVISIONS OF THE FLSA)

121. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

122. Defendants, in violation of the FLSA, failed to pay Plaintiffs overtime compensation at rates of one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek, in violation of 29 U.S.C. § 207 (a)(1).

123. Defendants' failure to pay Plaintiffs and the putative FLSA Class members overtime compensation was willful within the meaning of 29 U.S.C. § 255(a).

124. Plaintiffs have been damaged in an amount to be determined at trial.

THIRD CAUSE OF ACTION
(VIOLATION OF THE NEW YORK MINIMUM WAGE ACT)

125. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

126. At all times relevant to this action, Defendants were Plaintiffs' employers within the meaning of the N.Y. Lab. Law §§ 2 and 651. Defendants had the power to hire and fire Plaintiffs, control their terms and conditions of employment, and determine the rates and methods of any compensation in exchange for their employment.

127. Defendants, in violation of the NYLL, paid Plaintiffs less than the minimum wage in violation of NYLL § 652(1) and the supporting regulations of the New York State Department of Labor.

128. Defendants' failure to pay Plaintiffs minimum wage was willful within the meaning of N.Y. Lab. Law § 663.

129. Plaintiffs have been damaged in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
(VIOLATION OF THE OVERTIME PROVISIONS OF THE NEW YORK STATE LABOR LAW)

130. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

131. Defendants, in violation of the NYLL and associated rules and regulations, failed to pay Plaintiffs overtime compensation at rates of one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek, in violation of N.Y. Lab. Law § 190 *et seq*. and supporting regulations of the New York State Department of Labor.

132. Defendants' failure to pay Plaintiffs overtime compensation was willful within the

meaning of N.Y. Lab. Law § 663.

133. Plaintiffs have been damaged in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
(VIOLATION OF THE SPREAD OF HOURS WAGE ORDER OF THE NEW YORK COMMISSIONER OF LABOR)

134. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

135. Defendants failed to pay Plaintiffs one additional hour's pay at the basic minimum wage rate before allowances for each day Plaintiff's spread of hours exceeded ten hours in violation of New York Lab. Law § 650 *et seq*. and the wage order of the New York Commissioner of Labor codified at N.Y. COMP. CODES R. & REGS. Tit. 12, § 137-1.7 and 137-3.11.

136. Defendants' failure to pay Plaintiffs an additional hour's pay for each day Plaintiffs' spread of hours exceeded ten hours was willful within the meaning of New York Lab. Law § 663.

137. Plaintiffs have been damaged in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
(VIOLATION OF THE NOTICE AND RECORDKEEPING REQUIREMENTS OF THE NEW YORK LABOR LAW)

138. Plaintiffs repeat and reallege all paragraphs above as though fully set forth herein.

139. Defendants failed to provide Plaintiffs with a written notice, in English and in Spanish (Plaintiffs' primary language), of their rate of pay, regular pay day, and such other information as required by NYLL §195(1).

140. Defendants are liable to each Plaintiff in the amount of $2,500, together with costs and attorneys fees.

SEVENTH CAUSE OF ACTION
(VIOLATION OF THE WAGE STATEMENT PROVISIONS

OF THE NEW YORK LABOR LAW)

141. Plaintiffs repeat and reallege all paragraphs above as though set forth fully herein.

142. Defendants did not provide Plaintiffs with wage statements upon each payment of wages, as required by NYLL 195(3).

143. Defendants are liable to each Plaintiff in the amount of $2,500, together with costs and attorneys fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendants:

(a) Designating this action as a collective action and authorizing prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all putative class members, apprising them of the pendency of this action, and permitting them promptly to file consents to be Plaintiffs in the FLSA claims in this action;

(b) Declaring that Defendants have violated the minimum wage provisions of, and associated rules and regulations under, the FLSA as to Plaintiffs (including the prospective collective class members);

(c) Declaring that Defendants have violated the overtime wage provisions of, and associated rules and regulations under, the FLSA as to Plaintiffs (including the prospective collective class members);

(d) Declaring that the Defendants have violated the recordkeeping requirements of, and associated rules and regulations under, the FLSA with respect to Plaintiffs' (and the prospective collective class members') compensation, hours, wages, and any deductions or credits taken against wages;

(e) Declaring that Defendants' violation of the provisions of the FLSA were willful as to Plaintiffs (including the prospective collective class members);

(f) Awarding Plaintiffs (including the prospective collective class members) damages for the amount of unpaid minimum and overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA as applicable;

(g) Awarding Plaintiffs (including the prospective collective class members) liquidated damages in an amount equal to 100% of their damages for the amount of unpaid minimum and overtime wages, and damages for any improper deductions or credits taken against wages under the FLSA as applicable pursuant to 29 U.S.C. § 216(b);

(h) Declaring that Defendants have violated the minimum wage provisions of, and rules and orders promulgated under, the NYLL as to Plaintiffs;

(i) Declaring that Defendants have violated the overtime wage provisions of, and rules and orders promulgated under, the NYLL as to Plaintiffs;

(j) Declaring that Defendants have violated the Spread of Hours Wage Order of the New York Commission of Labor as to Plaintiffs;

(k) Declaring that the Defendants have violated the notice and recordkeeping requirements of the NYLL with respect to Plaintiffs' compensation, hours, wages; and any deductions or credits taken against wages;

(l) Declaring that Defendants' violations of the New York Labor Law and Spread of Hours Wage Order were willful as to Plaintiffs;

(m) Awarding Plaintiffs damages for the amount of unpaid minimum and overtime wages, damages for any improper deductions or credits taken against wages, as well as awarding spread of hours pay under the NYLL as applicable;

(n) Awarding Plaintiffs damages for Defendants' violation of the NYLL notice and recordkeeping provisions, pursuant to NYLL §§198(1-b), 198(1-d);

(o) Awarding Plaintiffs liquidated damages in an amount equal to one hundred percent (100%) of the total amount of minimum wage, spread of hours pay, and overtime compensation shown to be owed pursuant to NYLL § 663 as applicable; and liquidated damages pursuant to NYLL § 198(3);

(p) Awarding Plaintiffs (including the prospective collective class members) pre-judgment and post-judgment interest as applicable;

(q) Awarding Plaintiffs (including the prospective collective class members) the expenses incurred in this action, including costs and attorney's fees;

(r) Providing that if any amounts remain unpaid upon the expiration of ninety days following issuance of judgment, or ninety days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of judgment shall automatically increase by fifteen percent, as required by NYLL § 198(4); and

(s) All such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 15, 2013

MICHAEL FAILLACE & ASSOCIATES, P.C.

By: ______________________________

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